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THE CONTRACT OF SALE IN LATIN AMERICA

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The contract of sale in civil law—more commonly referred to as purchase and sale[1]—is defined in the civil codes of Italy and Venezuela as "a contract by which one person binds himself to give a thing and another to pay the price."[2]

Brazil describes it in its Code of Commerce: The mercantile contract of purchase and sale is perfect and concluded as soon as the purchaser and the seller are in accord as to the thing, the price and the conditions, and from that moment neither of the parties may repent (withdraw) without the consent of the other even though the thing has not been delivered nor the price paid. It is understood, in conditional sales, that the contract is not deemed perfect until the condition has been fulfilled.[3]

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[1] Spanish, *compraventa;* Portuguese, *compra e venda;* Italian, *vendita.*

[2] Art. 1513, Civil Code, Venezuela, 1922; art. 1447, Civil Code, Franchi, Milan, 1936. Cf., *Clark* v. *Gault,* 77 Ohio St. 497 (1908): A sale is a contract founded on a money consideration by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer.

[3] Art. 191, Commercial Code, Bevilaqua, Rio de Janeiro, 1932. See also, art. 450, Code of Commerce, Argentina, Lajouane, Buenos Aires, 1932.

The case law of Mexico, as developed by the *Suprema Corte de Justicia*, declares that the contract of purchase and sale is perfect when the thing and its price are specified, and mutual consent is manifested. Once perfected, the parties remain legally bound to its performance, the vendor to deliver the thing sold, in the place or to the person designated, and the buyer to pay the price stipulated.[4]

What Constitutes a Commercial Sale?

Whether a transaction be civil or commercial will determine whether a controversy arising therefrom is to be decided according to the rules of the civil or commercial code. In some cases, the effect might be fatal respecting the injured party. For example, in Cuba, actions relating to the possession of personalty are barred in six years under the Civil Code (Arts. 1955, 1962), whereas the same type of action under the Code of Commerce against the security of an intermediary agent will be barred in six months from the date of receipt of the commercial securities or funds delivered to him for business purposes (Art. 946). Again, in sales of realty or personalty, the action arising from differences in quantity or quality is barred in six months under the Civil Code (Arts. 1469-1472, 1490), yet the same type of action under the Code of Commerce must be brought within four days if the merchandise is received packed (Art. 336), or within thirty days after receipt when founded upon hidden defects (Art. 342).[5]

According to one Mexican decision, the contract of purchase and sale, as to its civil and commercial effects, should be analyzed in accordance with the precepts of the Civil Code and Code of Commerce. In the first case, the contract is concluded

[4] *Lopez Hermanos*, 16 Semanario Judicial, Quinta Epoca 653 (March 24, 1925).

[5] Cf., art. 1568, Civil Code, Venezuela; redhibitory actions for defects, realty one year, personalty three months; Code of Commerce, actions for apparent defects, two days after receipt; for hidden defects, two days after discovery provided buyer not guilty of "lack of diligence"; when goods packed, eight days (art. 153).

when the contracting parties have placed themselves in accord respecting the thing and the price; in the second (or commercial), the sale is taken as concluded from the precise moment in which the merchandise leaves the power of the vendor to be delivered to the purchaser.[6]

While this may serve to indicate a distinction between the two types of contract, it by no means determines what constitutes a civil or commercial contract of sale. The true test is whether the subject matter of the sale is intended for use or consumption by the purchaser, or whether it is intended for resale at a profit.[7]

Spain offers one of the most logical and succinct definitions of what constitutes a mercantile contract of purchase and sale *(compraventa mercantil)*:

> The purchase and sale of movable things for the purpose of reselling them, either in the same form in which they were bought, or in another different form, with the intention of profiting in the resale, shall be mercantile.[8]

According to the case law of the Supreme Court of Spain, the essence of this type of contract is the *animus* or intention with which it was perfected. Hence, if it was the intention of the purchaser to profit by the resale of the subject matter, even though he may have applied to his own use part of the movable things acquired, it is none the less a mercantile contract of sale in its entirety. On the other hand, if the purchaser did not have such an intention, the resale of the remainder does not take away the character of an ordinary or common contract even though he may have obtained a profit.[9]

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[6] *Fernando Dosal & Cia.*, 15 Semanario Judicial, Quinta Epoca 1145 (November 8, 1924).

[7] This appears to be the test even when the subject matter of the contract is real property if bought to resell for gain. See notes 9, 10, and 11, *infra*. Further, the writer finds no distinction between wholesale and retail sales in this connection. Merchants are defined simply as "those who, having legal capacity to exercise commerce, dedicate themselves to it habitually, (and) mercantile or industrial companies which shall be constituted in accord with this Code." (Art. 1, Code of Commerce, Betancourt, 2d ed., Habana, 1917.)

[8] Art. 325, Code of Commerce, Spain, 1885.

[9] *Sentencia*, June 3, 1898, Supreme Court of Spain. Cuban code law

Without doubt the increasing importance of purchases of land for the purpose of reselling it in small lots or after the erection of buildings has influenced contemporary Spanish law to depart from a rigid interpretation as to what may or may not constitute a mercantile contract of purchase and sale, leaving the courts at liberty to classify contracts as either civil or commercial, according to the circumstances.[10]

That the mercantile contract of purchase and sale is recognized in Mexico in respect of real property seems clear from the case law of the Supreme Court, although in order that the *compraventa mercantil* may exist as to real property *(bienes ráices)* it is required that the contract be concluded for the purpose of commercial speculation. If this intention is not deducible "in a clear and precise manner" from the contract itself, it becomes necessary to adduce other proof to show the mercantile character of the instrument.[11]

Inversely, it is important to know what does not constitute a commercial sale. As a general rule, noncommercial sales may be grouped into four classes: (1) Purchases of things intended for use or consumption, (2) sales by the owners of crops or the natural increase of cattle, or payment in kind under certain

follows Spanish case law in practically the same text (art. 325, Code of Commerce, Betancourt, 2d ed., Habana, 1917).

[10] See footnote to art. 325, Code of Commerce, Spain, 1885, p. 177; also, *Mora, Vda. de Sosa*, 26 Semanario Judicial, Quinta Epoca 155 (May 6, 1929), Supreme Court of Mexico, dealing with the rights of the parties under a nonformalized contract of purchase and sale of real property.

[11] *Gabriel Siller*, 22 Semanario Judicial, Quinta Epoca 685 (March 24, 1929). Author's note: In relying upon case law (*stare decisis*) as developed by the Supreme Court of Mexico, it must be remembered that five concordant and consecutive decisions of the Supreme Court of Justice in chambers, concurred in by at least four justices, or an equal number of judgments by the same court *en banc*, which have been approved by at least eleven members, are required to constitute a legal precedent. (Art. 193, Ley de Amparo, December 30, 1935). Due to obvious limitations of time and space, the writer has not attempted to cite every case in point, and although in several instances more than one decision on the same question has been found, he is not prepared to state that five decisions do or do not exist respecting every point raised. No research was made in Mexican case law prior to 1917, the date of the present Mexican Federal Constitution.

circumstances, (3) sales by artisans of their own products made in their own shops, and (4) the resale by any person not a merchant of the remainder of commodities which he has accumulated for his own consumption.[12] Argentina adds a fifth—the purchase of real property and its movable accessories,[13] and in Venezuela the insurance of things not in commerce, as well as life insurance, is an act of commerce with respect to the insurer only.[14]

When Does Title Pass?

This question is answered by the long article describing the sale in Brazilian commercial law—as soon as there is a complete meeting of the minds—but it does not say precisely, in so many words, that title has actually passed.[15] The civil codes of Italy and Venezuela, however, leave no doubt as to the transfer of ownership:

> The sale is perfect between the parties, and the buyer acquires the title with respect to the seller as soon as they are agreed upon the thing and the price, even though delivery of the thing has not been made, nor the price paid.[16]

While a similar rule is inferable from Article 2249 of the Mexican Civil Code, again it is not actually stated. However, the article seems in harmony with the doctrine in the *Lopez*

[12] Art. 326, Code of Commerce, Spain, 1885; Venezuela, art. 5, Code of Commerce, 1919.

[13] Art. 452, Code of Commerce, Argentina, Lajouane, Buenos Aires, 1932.

[14] Art. 6, Code of Commerce, Venezuela, 1919; see also, arts. 3, 4, 5 and 7 as to what does not constitute a mercantile contract of purchase and sale. However, if the act is commercial for one of the parties, all contracting parties are subject to commercial law (Argentina, art. 7; Venezuela, art. 2). Argentine courts have held that if the plaintiff merchant exercises an act of commerce he should appear before a commercial court even though the defendant might buy for his own consumption (*Cam. Civ.*, t. 50, p. 179, Malagarriga, Codigo de Comercio Comentado, 3d ed., Buenos Aires, 1927, vol. 1, sec. 19, p. 29).

[15] See note 3, *supra*; cf., sec. 8398, Ohio G.C., likewise subject to criticism for indefiniteness.

[16] Art. 1448, Civil Code, Franchi, Milan, 1936; art. 1514, Civil Code, Venezuela, 1922.

Hermanos case[17] to the effect that the contract of purchase and sale is perfect when the thing sold and its price are specified, and mutual consent is manifested.

Sales by Samples

If the sale has been made by samples or on the basis of a certain quality generally recognized in commerce, the buyer may not refuse to accept the things contracted for if they are in accord with the sample or the quality specified in the contract. In case the buyer refuses to accept them, experts will be appointed by both parties to decide whether the goods should or should not be accepted. If the experts declare in the affirmative, the sale is considered consummated; if to the contrary, the contract is rescinded without prejudice to the claims of the buyer for damages.[18]

However, in purchases of goods not in sight, and which cannot be classified by a determined quality generally recognized in commerce, it is understood, as a matter of law, that the buyer reserves the right to examine them and to rescind freely the contract if the goods are not satisfactory. The buyer also has the right of rescission if, by express provisions, he has reserved the right to try or test the merchandise (Art. 328).[19]

Delivery

If the seller fails to deliver the things sold within the time specified, the buyer may demand performance or rescission of the contract with full indemnity in either case for the damages caused by the delay (Art. 329). In contracts which stipulate a

[17] See note 4, *supra*. Note: The *Lopez* decision refers to a mercantile contract of sale.

[18] Art. 327, Code of Commerce, Betancourt, 2d ed., Habana, 1917; Mexico, 373; Spain, 327; Chile, 435; Argentina, 456. Hereafter, references to the Cuban Code of Commerce will be given in parentheses in the text, while references to comparative legislation will be given in the footnotes. The number following the name of the country indicates the corresponding article of its code of commerce.

[19] Mexico, 374; Spain, 328; Chile, 130, 131; Argentina, 455; Italy, 61. Cf., sec. 8396, Ohio G.C., sale by sample.

fixed quantity for delivery within a fixed period of time, the buyer is not obliged to accept a part, even under the promise of delivery of the rest. But if he accepts partial delivery, the sale is consummated with respect to the things received, saving the right of the buyer to order the performance of the contract as to the remainder, or its rescission in accordance with the preceding article (Art. 330).[20]

Loss or Deterioration

The loss or deterioration of the subject matter of the contract before its delivery by an unforeseen accident or without negligence on the part of the seller, enables the buyer to rescind the contract, except where the seller has become a depositary (bailee) of the merchandise in accordance with article 339, *infra*, in which case the liability of the seller is limited to that arising from the contract of deposit (Art. 331). The latter is similar to our bailment. When the buyer, without just cause, refuses to accept the things purchased, the seller may demand performance or rescission of the contract, depositing the subject matter judicially in the first case. The judicial deposit may also be utilized by the seller whenever the buyer delays taking charge of the merchandise. In such cases, the expenses originating from the deposit will run for the account of the party at fault (Art. 332).[21]

Risk of the Buyer

Under Cuban law, the damages and shrinkage of the subject matter after the contract has been perfected and the seller has the goods at the disposal of the buyer, in the place and at

[20] Mexico, 375; Spain, 330; Chile, 157; Argentina, 468; cf., secs. 8424, 8425 Ohio G.C. See also, *Lopez Hermanos*, 16 Semanario Judicial, Quinta Epoca 653 (March 24, 1925): In order that the virtual delivery of the thing sold be taken as complete, it is necessary that the buyer acknowledge that the merchandise remains at his disposal.

[21] Mexico, 377; Spain, 331, 333, 334; Chile, 142; Italy, 66, 68. The judicial deposit in civil law is equivalent to the common law procedure of placing the thing litigated in the custody of the court.

the time agreed upon, run for the account of the buyer except in cases of fraud or negligence (Art. 333).[22]

Risk of the Seller

On the other hand, the damages and shrinkage which the merchandise may suffer, even by a fortuitous happening *(caso fortúito)*, run for the account of the seller (1) if the sale has been made according to number, weight or measure, or where the thing sold is not certain and determined by marks or signs which identify it; (2) if, by express agreement or commercial usage, taking into consideration the nature of the thing sold, the buyer has the right to inspect or examine it beforehand; or (3) if the contract contains the provision that delivery will not be made until the thing sold acquires the conditions stipulated (Art. 334). In any case, if the things sold perish or deteriorate while they are under the control of the seller, the latter must return to the buyer the part of the price already received (Art. 335).[23]

Expenses of Delivery

If a fixed period for the delivery of the things sold has not been stipulated, the seller must have them at the disposal of the buyer within 24 hours after the conclusion of the contract (Art. 337). The expenses of delivery in commercial sales run for the account of the seller until the goods are placed, weighed or measured, at the disposal of the buyer, unless an express agreement to the contrary exists. However, the expenses of

[22] Mexico, 378; Chile, 143, 149, 150; Argentina, 463, 465. See also, *Lopez Hermanos*, note 4: The losses, damages and shrinkage which the merchandise sold may suffer will be for the account of the buyer if the thing has been delivered, and for the account of the seller if delivery has not been made.

[23] Mexico, 377; Spain, 331, 333, 334; Chile, 142, 143; Italy, 61, 66. The rule regarding things which have perished or deteriorated appears to be general; the Argentine Code declares that when the lack of the delivery of the effects sold is due to the fact that they have perished or have deteriorated by unforeseen accidents, without blame of the seller, all responsibility ceases on the part of the latter, and the contract remains rescinded in law, the price being returned to the buyer (art. 467, Com.).

their receipt or extraction outside of the place of delivery run for the account of the buyer (Art. 338).[24]

Payment—Deposit—Vendor's Lien

As soon as the subject matter of the contract has been placed at the disposal of the buyer, and the latter has expressed his satisfaction or the merchandise has been deposited judicially in the case provided for in Article 332, *supra*, the obligation arises on the part of the buyer to pay the price against account rendered *(al contado)* or according to the time agreed upon with the seller.[25] The latter may thus be converted into a depositary of the things sold, and is liable for their custody and conservation in accordance with the laws governing deposits (Art. 339).[26] During the time the goods are in the possession of the seller, even though in the nature of a deposit, he has a preference or seller's lien for the payment of the price against any other creditor, with interest for the delay (Art. 340.)[27] In any event, delay in payment of the price places the buyer under the obligation of paying legal interest on the amount owed the seller (Art. 341).[28]

Defects — Statute of Limitations

The buyer who, at the time of receiving the thing sold, examines it to his satisfaction, has no right of action for recovery against the seller for a defect of quantity or quality. However, the buyer has his right of action against the seller for a defect in the quantity or quality of merchandise received in bales or packed, provided he bring his action within four days after

[24] Mexico, 379, 382; Spain, 332, 337, 338; Chile, 144, *et seq.*; Argentina, 460, 461; Italy, 68; cf., sec. 8423, Ohio G.C.

[25] Cf., sec. 8422, Ohio G.C.

[26] Argentina, 464, 465.

[27] Mexico, 386; Spain, 340; Chile, 151; Argentina, 466.

[28] Mexico, 380; Spain, 341; Chile, 144, *et seq.* Delay constitutes an obligation to pay interest upon the amount owing at the legal rate. See *Armstrong Packing Co.*, 23 Semanario Judicial, Quinta Epoca 933 (August 20, 1928).

date of receipt, and provided further, that the damage (*averia*) does not arise from a fortuitous happening (*caso fortúito*), an inherent defect (*vicio propio de la cosa*), or fraud. In such cases, the buyer may elect as to rescission or specific performance, holding the seller liable for the damages caused by the defects or shortages. Nevertheless, the seller may avoid such a claim by insisting that the inspection for quantity and quality be made by the buyer in the act of delivery (Art. 336).[29]

Inherent Defects: The buyer who fails to file his claim for inherent or hidden defects (*vicios internos*) within thirty days after delivery loses all right of action to recover against the seller for this cause (Art. 342). However, the party who has proceeded with malice or fraud must respond for the damages thus caused, without prejudice to the corresponding criminal proceedings (Art. 344), and in every commercial sale, the seller is bound to respond to the buyer for his warranty of title, peaceful possession, and against hidden or inherent defects (Art. 345).[30]

Price

In Chile, there is no sale if the parties fail to agree on the price or the manner of determining it; but if the thing sold should be delivered, it is presumed that the parties have agreed upon the current price which the thing had as of the date and

[29] Mexico, 383; Spain, 336, 342; Chile, 158, 159; Argentina, 473; Italy, 70; cf., *Manton* v. *Perry*, 9 Ohio C.C. (N.S.) 326, 328 (1908): Under an implied warranty of fitness, it is the duty of the buyer of goods to notify the seller of any defective condition immediately upon discovery. If the buyer, after full opportunity for inspection, retains goods and resells them, he has waived any claim he might have had for damages. See also, secs. 8427, 8428, 8429, Ohio G.C.

[30] *Ibid.* See also, Mexico, 384; Spain, 345; Chile, 154. In Ohio, the purchaser has an option, in case of a breach of warranty, of terminating the contract, and returning or tendering back all goods at the place where he had received them from the seller, or he may retain the goods and sue for damages for the breach of the warranty. *Strouse* v. *Schenck*, 6 Ohio L. Abs. 443 (1928). But where goods delivered under a contract of sale are retained and used after inspection or after a reasonable opportunity for inspection, any defect in them is thereby waived. *Bigalow Fruit Co.* v. *Huxley*, 23 Ohio C.C. (N.S.) 479, 481 (1912). See Sec. 8449, Ohio G.C.

place of the contract. Where there is a diversity of prices at the same time and place, the buyer will pay the average price (*precio medio*). This rule is applicable also in case the parties refer to the price the thing may have at a time and place different from the time and place of the contract.[31] Moreover, if the third party to whom the fixing of the price has been entrusted fails to do so, whatever the reason may be, and the subject matter has been delivered, the contract will be carried out by the one who had the thing the day the contract was concluded, and in case of a variation in prices, then at the average price.[32]

However, those sums which are paid in commercial sales as earnest money (*señal*) are always deemed a payment on account of the price and as proof of ratification of the contract unless a contrary stipulation appears (Art. 343).[33]

Lesión

In conformity with the thesis of the civil law contract of purchase and sale, commercial sales will not be subject to rescission because of *lesión* (Art. 344.)[34] The latter has a meaning peculiarly its own, other than that usually ascribed to it in the ordinary dictionary. It is believed that the nearest approach to a correct translation into English would be "partial failure of consideration." *Lesión* is defined by Escriche as "the damage or prejudice which is caused in contracts for a valuable consideration, and especially in purchases and sales, by not making them in their just price:"[35] There were two degrees of *lesión*

[31] Art. 139, Code of Commerce, Chile, 1865, official ed., 1937; cf., art. 142, Code of Commerce, Venezuela, 1919; also sec. 8389, Ohio G.C.

[32] Art. 140, Chile; cf., art. 142, Venezuela, sec. 8390, Ohio G.C., price fixed by third person. The Chilean rule in the last sentence of this paragraph appears confusing. The writer interprets it to signify that "the one who had the thing the day the contract was concluded," if the vendor, must deliver at the average price; if already delivered to the vendee, the latter must pay the average price.

[33] Mexico, 381; Spain, 343; Chile, 107-109; Argentina, 475.

[34] Art. 385, Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[35] Escriche, Diccionario de Legislación y Jurisprudencia, Paris and Mexico, 1920, p. 1160. Cf., Cuba, 344; Mexico, 385; Spain, 344; Chile, 126,

under early Spanish law, *lesión enorme* and *lesión enormísima.* The former is the degree of damage suffered by "having been deceived in something less than the half of the just price"; the latter, "in much more than the half of the just price."[36]

Lesión enorme was sufficient cause for rescission of the contract.[37] In any event, *lesión* appears to operate in two ways—when the seller sells at a price greater than the fair value of the thing, or when the buyer buys at price less than the fair value, provided deception be present.[38]

Thus, *lesión* arises where a thing which "justly was worth ten, had been sold for more than fifteen, or bought for less than five."[39] Upon proof of the *lesión* and the deceit (*engaño*), the injured party may claim the return of the "excess of the just price which the thing had at the time of the sale, or that there be given back what is lacking up to this, or that the contract be rescinded and annulled, each one taking what he gave to the other."[40]

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[36] Escriche, *op. cit.*, p. 1160.

[37] *Ibid.* Whether the doctrine of *lesión* would operate to sustain rescission under modern commercial law would necessarily be determined by the jurisprudence of the respective forum. In contemporary practice, the proper remedy, as a general rule, is an action for damages against the party guilty of "malice or fraud," without prejudice to criminal proceedings (Cuba, 344; Mexico, 385; Spain, 344).

[38] Art. 1074, Civil Code, Spain, 1889, provides that partitions of an inheritance may be rescinded for cause of *lesión* in more than the fourth part, taking into consideration the value of the things when adjudicated. Art. 1079 denies rescission of the partition on the ground of *lesión* because of the mere omission of some of the objects of the inheritance, holding that the inheritance should be completed by adding to it the things omitted. The Supreme Court of Spain has ruled that the omission, in partitions, even though it caused *lesión* in more than the fourth part, does not give rise to rescission in the absence of the requirement that such property be adjudicated. See *Sentencia,* February 28, 1930, as reported by Fernandez, Diccionario de Jurisprudencia, Madrid, 1930, vol. 3, p. 7.

[39] This example was taken from Escriche, *op. cit.*, p. 1160.

[40] *Ibid.* It will be noted that the example abides by the more-or-less-than-half variation, and seems analogous to the equitable precept against unjust enrichment.

Breach of Warranty

The alleged breach of an implied warranty as to fitness in a mercantile contract of sale was recently brought to the writer's attention. We can select Mexico as the country for our example, its case and statute law being identical with that of the jurisdiction in which the claim arose.

We will assume that an American manufacturer has in Mexico a mere sales representative without power to bind the company, all of whose orders are subject to approval and acceptance in the United States. As the result of his efforts the company receives an order by mail amounting to $22,000, and accepts it at its home office in the United States. Under the terms of the contract payment is to be made upon delivery of the goods at a place of embarkation in the United States. The material was selected from line drawings in a catalogue, and the contract was fully performed by both parties as of June 1, 1939. Shortly after receipt of the material in Mexico, large parts of it were resold to customers of the vendee.[41]

In September, after the material has been in use some three months, the Mexican importer declares it is defective as to fitness in comparison with other brands of similar products selling throughout the industry at approximately the same price, and threatens to sue the American manufacturer before Mexican courts to recover a part of the price sufficient to compensate for the alleged defect in quality. The product in question does not come packed or in bales and may be readily inspected. The plaintiff[42] also contends that the defendant is "doing business" in Mexico in the legal significance of the term, and is, therefore, subject to the Mexican income tax law.

Serious doubt is entertained as to the means by which it would be possible for Mexican courts to exercise jurisdiction over the instant mercantile contract of purchase and sale. In order to decide this question it will be necessary to consider

[41] Cf., *Manton* v. *Perry*, note 29, *supra.*

[42] The terms "plaintiff" and "defendant" are used arbitrarily to distinguish the parties; the suit has not yet been filed.

(1) whether the action be civil or commercial, (2) real or personal, and (3) the competency or jurisdiction of the courts.[43]

Commercial Nature of the Action

Under the definition of the Mexican Code of Commerce, commercial actions are those which have for their purpose to ventilate and decide controversies derived from acts of commerce.[44] It is submitted without further discussion that the present controversy arises from a commercial transaction,[45] hence is a commercial action within the purview of the Code of Commerce, at least as to the defendant company.[46]

Personal Nature of the Action

By means of *acciones reales* one claims inheritances, real rights, or the declaration of release from real encumbrances. They are exercised against the person who has the thing in his power.[47]. The *acción personal* is one which the plaintiff brings in order to demand the performance of a personal obligation, or to claim from another person that the latter give, do, or cease doing all that to which he was obligated.[48] From these definitions it would appear that the personal action is the type which would be brought by the present plaintiff.[49]

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[43] In the United States, it has been held as recently as February 14, 1939, that service of summons and complaint upon a foreign corporation by delivering a copy thereof to an officer of the corporation is not effective unless the corporation is doing business within the state. *Pioneer Utilities Corporation* v. *Scott-Newman Inc.*, 26 F. Supp. 616.

[44] Art. 1049, Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[45] Arts. 4, 75, 76, Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[46] Art. 1050, Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[47] Art. 3, Codigo de Procedimientos Civiles, Santamaria, Mexico, 1934.

[48] Enjuiciamiento Civil, Manresa y Navarro, 5th ed., Madrid, 1928, p. 246; cf., art. 25, Codigo de P. C., Santamaria, Mexico, 1934.

[49] The claim for damages and prejudices always signifies the exercise of the personal action. *Sentencia*, January 7, 1931, Supreme Court of Spain. Cf., *Genin* v. *Grier*, 10 Ohio 210 (1840): In Ohio, personal actions may be prosecuted in any county where process can be served on the defendant. See discussion at pp. 212, 213, and first half of 214. Mr. Justice Hitchcock has (apparently without intention) drawn many of the distinctions existing between the real and the personal action in civil law. See also, *St. John* v. *Parsons*, 54 Ohio App. 420 (1936), in like vein.

Service of Summons and Jurisdiction

Having found authority upon which to base the conclusion that the action contemplated is commercial in nature, it is essential to investigate the competency of Mexican commercial courts. In the first place, the initial service of summons in Mexican commercial actions must be personal, although notice of subsequent hearings in the same action may be served by publication.[50] Furthermore, a judgment which is rendered without service of summons having been made upon the defendant with all legal formalities amounts to a violation of constitutional guaranties.[51] Consequently, it is difficult to conceive of a valid service upon an unempowered nonlegal agent, such as the sales representative described.

Under the previsions of Chapter VII (*De las Competencias*) of Book V (*De los Juicios Mercantiles*),[52] whatever may be the action, the court of the place which the debtor has designated as the place of suit for payment, or the court of the place designated in the contract for the performance of the obligation, will be preferred over any other court.[53] If neither designation has been made, the court of the domicile of the debtor will be competent, whatever may be the action brought.[54]

[50] *Aristi de Argumedo, Maria de los Angeles,* 20 Semanario Judicial, Quinta Epoca 430 (February 21, 1927). For exceptions to the general rule, and for service of summons abroad, see art. 1068, *et seq.*, Codigo de Comercio Reformado, Andrade, Mexico, 1936. However, such exceptions apparently presuppose a jurisdiction *in rem,* by stipulation of the parties, or where performance of the contract or the formal "place" of the contract is in Mexico (see art. 1107).

[51] *Moreno Terrazas Abel y coag.*, 16 Semanario Judicial, Quinta Epoca 515 (March 10, 1925), par. 2, art. 14, Constitution, Mexico.

[52] Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[53] *Ibid.*, art. 1104. The competent court to take jurisdiction of the proceedings is that of the place of performance of the obligation. *Sentencia,* April 8, 1931, Supreme Court of Spain.

[54] Art. 1105, C. de C., Andrade. When considering mercantile actions, jurisdiction should be decided in accordance with the provisions of the Code of Commerce, and the latter provides that when the place in which the debtor is to be sued for payment has not been designated, nor the place in which to perform the obligation, jurisdiction belongs to the court of the domicile of the debtor, whatever may be the action brought. *Rivera, Carmen,* 21 Semana-

In the instant case, no designation of a place of suit for payment could have been made, as payment was effected in the United States either in advance of or at the moment of delivery in the United States, the place of performance would be shown by the contract itself or the mutual correspondence which evidences it,[55] and in the absence of both designations, we would still have the domicile of the defendant as the jurisdiction within which to bring the action.[56]

Spanish Case Law

Much of the comparative legislation cited in the Mexican Code of Commerce as footnotes to its articles is selected from the Spanish code, thus it may be inferred that Spanish case law would be persuasive in Mexico, although not necessarily binding upon Mexican courts. With this thought in mind, we cite the case of *D. J. P.* v. *D. E. R.*, decided by the Supreme Court of Spain, August 5, 1930.[57]

This was an action based upon the contract of *compraventa mercantil* and was brought to recover the purchase price of merchandise shipped "for the account and at the risk of the purchaser." Plaintiff filed his action before the court of La Bañeza, whereas defendant was a resident of Tuy. The defendant filed a plea to the jurisdiction (*competencia por inhibitoria*), alleging that in the absence of a written contract, as well as the

rio Judicial, Quinta Epoca 686 (September 5, 1927). When competency refers to the jurisdiction of a mercantile action, the provisions which are to be taken into account to decide it are those of the Code of Commerce. *Andressen, Luis*, 23 Semanario Judicial, Quinta Epoca 370 (June 18, 1928).

[55] In accordance with the Mexican Code of Commerce, the court of the place designated in the contract for the performance of the obligation will be preferred over any other. *Rafael Vega*, 27 Semanario Judicial, Quinta Epoca 335 (September 13, 1929).

[56] Cf., *Blair* v. *Newbegin*, 65 Ohio St. 425, 439, 62 N.E. 1040 (1902): An obligation resting upon contract may be enforced in any jurisdiction where service may be had on the party.

[57] Reported by Fernandez, Diccionario de Jurisprudencia, Madrid, August, 1930, p. 14. In reporting decisions of the Supreme Court of Spain, it is not unusual for the Spanish reporter to refer to the parties by their initials only.

fact that the draft had been sent to Tuy, the action should have been filed against the defendant in Tuy, the court of his domicile. The merchandise was "invoiced in the station of La Bañeza."

Held: That upon the conclusion of a contract of purchase and sale whereby the merchandise traveled at the risk and for the account of the purchaser, and where payment was to be made in La Bañeza (the domicile of the plaintiff-vendor), it is manifest that the court of La Bañeza is competent *because the latter is the place in which the obligation was to be performed.*[58]

Furthermore, where delivery is made in the domicile of the vendor, the court of the latter place takes jurisdiction of a suit for payment of the price. The issue of a draft to collect the price has no greater effect than the giving of facilities to the debtor for the purpose of making good his debit. The fact that the sale was made by a traveling representative is not a circumstance which may set aside the rule of competence.[59]

Locus Solutionis

According to the facts upon which the present claim is based, the obligation was performed wholly within the United States and nowhere in Mexico. The vendor accepted the order in the United States, manufactured the merchandise in the United States, received payment in the United States, shipped the merchandise to a point of embarkation in the United States, and there the merchandise was taken over by an agent of the plaintiff. From that point on, the merchandise traveled through Mexico "at the risk and for the account of" the buyer as his own merchandise, title already having passed, presumably at the time of payment.[60]

[58] Cf., art. 156, sec. II, Codigo de Procedimientos Civiles, Santamaria, Mexico, 1934.

[59] *Sentencia,* March 3, 1932, Supreme Court of Spain.

[60] Cf., *Hall* v. *Cordell,* 142 U.S. 116, 120 (1891): The law of the place of performance must determine the rights of the parties unless otherwise stipulated.

As we have seen, the type of action involved is the personal action. Again relying upon Spanish law as persuasive in Mexico, reference is made to the *acción personal* as described by Manresa y Navarro. This class of action may be brought (1) before the court of the place where the obligation is to be performed, (2) before the court of the domicile of the defendant, or (3) before the court of the place of the contract. If the parties, upon entering into the contract, stipulate the place where the obligation is to be performed, they have tacitly agreed that all of its incidences may likewise have effect in the same place, among them being the suit which may arise as to performance. It follows that the court of the latter place is competent to take jurisdiction and that it is competent with preference over any other.[61]

The designation of the place in which the obligation is to be performed is equivalent in civil law to a submission of the parties to the court of that place. When nothing has been stipulated in that regard, the plaintiff may elect between the court of the domicile of the defendant and the court of the place of the contract. *But in the last named instance, the court is competent only when the defendant is found in such place, even though accidentally, to the end that he may be and is there served with process.* Without this circumstance, the court of the place of the contract may not take jurisdiction of the suit, *and the plaintiff must have recourse to the court of the domicile of the defendant.*[62]

The foregoing theory of venue based on performance is strong, and goes beyond ours. It actually lays the venue of the action at the place of performance in preference to any other

[61] Manresa y Navarro, *op. cit.*, p. 248. Cf., *Banco de Londres y Mexico*, 13 Semanario Judicial, Quinta Epoca 735 (October 13, 1923): The Code of Commerce provides that whatever the nature of the proceedings may be, the court of the place designated in the contract for the performance of the obligation will be preferred over any other court. Also, *Pan-American Securities Corporation* v. *Fried. Krupp Aktiengesellschaft*, 6 N.Y.S. (2d) 993, 1000 (1938): All matters connected with the performance of a contract are regulated by the law of the place where the contract by its terms is to be performed.

[62] Manresa y Navarro, *op. cit.*, p. 249.

forum, irrespective of the domicile of the defendant, whereas our procedure permits an obligation resting upon contract to be enforced in any jurisdiction where service may be had on the party,[63] although we presume to apply the law of the place of performance.[64] The civil law method is the simpler of the two. Where the place of performance is stipulated, either party knows where he may bring his action; he does not have to pursue a defendant, who, under the theory just described, submits himself to the jurisdiction of the place of performance when he signs the contract.

Locus Contractus

The study of this field of the law of contracts embraces two questions: Where was the contract perfected and when was the contract perfected? That a forensic controversy regarding both time and place has existed for many years is obvious from the wealth of material available. In civil law, the question of time and place of perfection of a mercantile contract rests upon four theories,[65] among them the theories of *cognición* and *expedición*. The former insists that the contract is not completed until the acceptance of the offeree is brought to the knowledge of the offeror; the second maintains that the contract is completed as soon as the acceptance is despatched.

By the great weight of English and American authorities,

[63] *Blair* v. *Newbegin*, note 56, *supra*.

[64] *Monahan* v. *N. Y. Life Ins. Co.*, 26 F. Supp. 859, 861 (1939): The contracts were made in the state of Arkansas, to be performed in the state of New York, and the suits were instituted in the state of Oklahoma, this court having jurisdiction of the parties. But the *lex fori* determines how and when the law of the place of performance is to be applied (see p. 862).

[65] The four theories may be outlined in the following form: I—*Información* or *cognición*—the acceptance must be brought to the knowledge of the offeror. II—*Manifestación*—(a) theory of declaration—the contract is perfect at the moment in which the acceptance is exteriorized in any form; (b) theory of *expedición*—requires, apart from the manifestation of the acceptance, that the latter has been directed to the offeror even when it does not require that it has arrived in his hands; (c) theory of *recepción*—according to this, it is required that the material document containing the acceptance has arrived in the hands of the offeror. See Gay de Montellá, Tratado de la Legislación Comercial Española, Barcelona, 1930, vol. 1, pp. 204, 205.

acceptance, if made by mail or telegraph, is operative from the moment its transmission begins,[66] and a contract made by correspondence is made at the place where the letter of acceptance is posted.[67] Stated in slightly different terminology, the place at which a contract is made is the place at which the offer is accepted.[68]

That a conflict between the two civil law theories mentioned above has existed even as to the respective codes of the same country is evident from a study of Spanish and Mexican civil and commercial law. The Spanish Civil Code of 1889 follows the theory of *cognición;* the acceptance made by letter does not bind the person making the offer until it is brought to his knowledge. In such cases, the contract is presumed to have been perfected in the place in which the offer was made.[69] On the other hand, the Code of Commerce of 1885 of the same country declares that mercantile contracts celebrated by correspondence are perfect "as soon as it may be answered accepting the proposal" (*desde que se conteste aceptando la propuesta*),[70] thus following the theory of *expedición.*[71]

The same conflict obtains in the Mexican codes. Like the Spanish Civil Code of 1889, the Mexican Civil Code of 1928 provides that the contract is formed at the moment in which the proponent receives the acceptance,[72] whereas the Mexican Code

[66] Page, The Law of Contracts, 2d ed., 1920, vol. 1, sec. 199, p. 296; sec. 215, p. 317. In Ohio, an assignment was complete and effectual to pass title to the assignee from the time the deed was placed in the post office as against subsequent attaching creditors. *Johnson* v. *Sharp,* 31 Ohio St. 611 (1877).

[67] Page, *op. cit.,* sec. 214, p. 317. Under New York law a contract is made at the time and place where the final act necessary for its formation is done. *Cray* v. *Hegarty,* 27 F. Supp. 93, 96 (1939).

[68] Page, *op. cit.,* sec. 214, p. 317. It is well settled that a contract is made at the place where the letter of acceptance is mailed, such being the place where the last act necessary to the formation of the contract is performed. *C. H. Parker Co.* v. *Exeter Refining Co.,* 79 Pac. (2d) (Cal.) 1114, 1115 (1938).

[69] Art. 1262, Spanish Civil Code, 1889.

[70] Art. 54, Spanish Code of Commerce, 1885.

[71] As discussed by Gay de Montellá, *op. cit.,* p. 204, *et seq.*

[72] Art. 1807, Mexican Civil Code, 1928.

of Commerce holds to the theory of *expedición* appearing in the Spanish Code of Commerce of 1885, and employs identically the same text—*desde que se conteste aceptando la propuesta.*[73] This raises a question of law, that is, whether civil or commercial law is applicable.

Many commercial codes provide that in those cases which are not governed by the rules of commercial law, the provisions of the civil code will be applied.[74] This, however, is not true of the Mexican Code of Commerce, which expressly declares that, "in the absence of provisions of this Code, those of the common law shall be applicable to acts of commerce."[75] Therefore, we find ourselves restricted to the Code of Commerce and the common law for an interpretation of the commercial legislation of Mexico.[76]

The same rule, slightly enlarged, obtains in the Spanish Code of Commerce of 1885.[77] In contemplation of these rules, the conclusion follows that the provisions of the Mexican Code of Commerce will prevail in the instant case of a mercantile contract of purchase and sale, there being no "absence of provisions" which would necessitate turning to the Civil Code or the common law for a guiding rule. Consequently, the theory of *expedición* will be the basis for determining the time and the place of the contract.

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[73] Art. 80, Codigo de Comercio Reformado, Andrade, Mexico, 1936.

[74] Art. 1, Titulo Preliminar, and art. 207, Argentine Code of Commerce, 1932 edition; art. 8, Venezuelan Code of Commerce, 1919.

[75] Art. 2, Codigo etc., Andrade, Mexico, 1936.

[76] As exceptions to the general rule, the provisions of the civil law, with the modifications and restrictions of the Code of Commerce, will be applicable to acts of commerce respecting capacity of the parties, and the exceptions and causes which rescind or invalidate contracts. See art. 81, Codigo de Comercio Reformado, Andrade, Mexico, 1936. In order that the common law be applied to mercantile transactions it is necessary that a provision for the case be lacking in the Code of Commerce, that is to say, when dealing with a mercantile matter it leaves it without a complement. In general terms, the civil laws is applicable to acts of commerce when the matter, by its nature, does not fit into the terms of commercial law. *Compañia Minera de Naica,* 8 Semanario Judicial, Quinta Epoca 50, 53 (January 6, 1921).

[77] Art 2, Spanish Code of Commerce, 1885. See also, the comments by Lorenzo Benito in his Manual de Derecho Mercantil, 3d ed., Madrid, 1924, vol. 2, secs. 1188, 1189, pp. 242, 243; sec. 1197, p. 247.

Thus, in Mexican commercial law a mercantile contract is per fect as soon as the offer is accepted (answered) by the offeree, and the perfection of the contract is not delayed until the answer reaches the offeror, but takes place as soon as the answer is despatched by letter or telegram.[78] The time at which the contractual obligation is born is the date of despatch of the acceptance by the offeree, and not the date of its receipt by the offeror. If a Mexican buyer writes to an American manufacturer, extending an offer to purchase, the contract is perfect as soon as the American manufacturer posts his letter of acceptance, and the "place" of such a mercantile contract would be within the United States.[78a]

Mexican Statute of Limitations

A legal principle of importance in the present case remains to be discussed briefly—the time limit within which claims for apparent or hidden defects may be made. Article 383 of the Mexican Code of Commerce provides that

> The purchaser who, within five days from receipt of the merchandise fails to present his claim to the vendor in writing for deficiencies of quality or quantity, or who, within thirty days from date of receipt, fails to claim for hidden defects *(vicios internos)*, loses his right of action and his right to recover against the vendor for such causes.

This is interpreted and sustained by the Supreme Court of Mexico in the *Rawlings* case:

> When no claim has been filed within due time for deficiencies of

[78] Art. 80, Codigo de Comercio Reformado, Andrade, Mexico, 1936. A telegram will produce a binding effect between the parties only when this means has been admitted previously in writing, and provided that the telegrams contain the conventional signs previously agreed upon by the parties.

[78a] The following decisions of the Supreme Court of Mexico would seem to substantiate these conclusions: *Ramriez* v. *Elorduy*, 20 Semanario Judicial, Quinta Epoca 365, 368 (February 12, 1927); *Juan Garcia Ruiz* v. *Jose Maria Zubirán*, 14 Semanario Judicial, Quinta Epoca 1481, 1493, 1494 (May 12, 1924); *Mier* v. *Roman*, 19 Semanario Judicial, Quinta Epoca 68, 71 (July 13, 1926); *Sociedad Francisco Berisáin*, 18 Semanario Judicial, Quinta Epoca 489, 490, 493 (March 6, 1926).

quality or quantity, the presumption exists in favor of the vendor that the order was filled correctly.[79]

The *Gomez* decision is possibly more inclusive in its rulings. In addition to giving the substantial requirements of the contract of *compraventa*, it lays down the following principles relative to a sale by samples or standard qualities:[79a]

> The purchase and sale which is made according to samples and qualities of merchandise, determined and known in commerce, will be held perfect by the mere consent of the parties, and the buyer who does not claim in due time for deficiencies of quality or quantity of the merchandise or the hidden defects of the same, will lose all action and right to recover against the vendor for such causes, and when he does not make such a claim, he must be deemed satisfied with the merchandise purchased.

Offeror and Offeree

Who the offeror is in the present case can be determined only as a question of fact. If the plaintiff made the initial advance, offering so much money for the merchandise, then the plaintiff is the offeror. If the reverse is true, that is, if the American manufacturer offered to sell the Mexican importer so much material at such and such a price, then the manufacturer is the offeror. Mere inquiry on the part of the importer as to terms and conditions would not constitute a valid offer.

Although the identity of the offeror might operate to change the "place" of the contract, this would seem to have little material effect, in view of the attendant circumstances, upon the rights or remedies of the parties, inasmuch as the

[79] *Rawlings Manufacturing Co.*, 33 Semanario Judicial, Quinta Epoca 1637, 1638, 1640, 1641, 1642 (October 26, 1931). Also, the Code of Commerce orders that the terms fixed for the exercise of actions proceeding from mercantile acts shall be fatal. *Banco Occidental de Mexico*, 25 Semanario Judicial, Quinta Epoca 290 (January 24, 1929). In treating of mercantile acts, prescription should be governed by the Code of Commerce, not by the provisions of the common law, and in conformity with the former, ten years are needed for the lapsing of mercantile obligations, except when the said code indicates a shorter period. *Levy, René*, 22 Semanario Judicial, Quinta Epoca 816, 818 (March 16, 1928).

[79a] *Gomez, Pedro*, 13 Semanario Judicial, Quinta Epoca 1086 (December 10, 1923).

place of performance was in the United States, and the proposed defendant was not and is not legally found in Mexico.

What Constitutes "Doing Business"

For purposes of the income tax law, the Mexican Government has expressly ruled that

> When the agent is not a representative with juridical power to bind his principal, but (is) what is called a simple messenger *(nuncio)* in doctrine, and the power to decide upon the acceptance of the order is reserved to the home office abroad, the contract is not to be understood as concluded in the Republic, but in the place of the domicile of the home office.[80]

A study of the American decisions mentioned in the footnote below will disclose that they are practically identical in theory and principle with the ruling of the Mexican Government cited immediately above. The conclusion seems proper that Mexican and American law is in agreement in this particular.[81]

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[80] See Circular No. 211-8-100 relativa a la debida interpretación del articulo 14 de la Ley del Impuesto Sobre La Renta, Diario Oficial No. 22, Mexico, June 7, 1939. It will be noted that this ruling is based directly on article 80 of the Mexican Code of Commerce.

[81] *Coblentz & Logsdon* v. *Powell*, 148 Ark. 151, 229 S.W. 25, 26 (1921); *Dennison Mfg. Co.* v. *Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Am. Contractor Pub. Co.* v. *Michael Nocenti Co.*, 139 N.Y.S. 853 (1913); *Brookford Mills, Inc.* v. *Baldwin*, 139 N.Y.S. 195 (1913); *Hopping* v. *Gear Medicine Co.*, 153 N.E. 231, 232 (1926); *McLarran* v. *Longdin-Brugger Co.*, 157 N.E. 828, 829 (1926).